Joyce Brothers Storage and Van Company *and* Patrick Baker. Case 13-CA-20960

August 18, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 2, 1982, Administrative Law Judge Arline Pacht issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and the Respondent filed a response to the exceptions.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt her recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Joyce Brothers Storage and Van Company, Chicago, Illinois, its officers, agents, successors, assigns, shall take the action set forth in the said recommended Order.

[1] The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

[2] In addition to filing exceptions the Charging Party has filed a motion to reopen the record. Subsequently, the Respondent filed an opposition to the motion to reopen the record and motion to strike the Charging Party's exceptions concerning references to evidence not incl· 'd in the record. The Charging Party's and Respondent's motions are hereby denied as lacking in merit.

The Administrative Law Judge cited *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), in finding that the General Counsel failed to make a *prima facie* showing that protected conduct was a motivating factor in the Respondent's decision to discharge Baker. In Member Jenkins' view, the *Wright Line* analysis is applicable only in cases involving mixed motives, where a genuine lawful reason and a genuine unlawful reason exist and are relied on. Thus, Member Jenkins would not apply that analysis where, as here, protected conduct is not shown to be a motivating factor in the decision to discharge an employee.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge: This case was heard before me on October 27 to 28 and December 15 to 16, 1981, in Chicago, Illinois. Pursuant to a charge filed on March 20, 1981, a complaint issued on April 24, 1981, and was consolidated with a separate complaint based on a charge filed by William Halliday in Case 13-CA-21135. However, by order of October 26, 1981, the Regional Director for Region 13 of the National Labor Relations Board, *sua sponte* severed the cases, dismissed the charge, and withdrew the complaint in Case 13-CA-21135.[1] The surviving complaint in the above-captioned case alleges, in substance, that Joyce Brothers (herein called Respondent) discharged and refused to reinstate Patrick Baker in violation of Section 8(a)(3) and (1) of the Act because he engaged in union activity. In addition, Respondent allegedly committed independent violations of Section 8(a)(1) of the Act by threatening to dismiss the Charging Party on January 16 or 17 and on February 11, 1981, and by threatening another employee with discharge and other reprisals on various occasions between February and July 1981 for offering evidence in support of Baker's grievance.[2] Respondent filed answers denying the commission of any unfair labor practices and pleaded affirmatively that deferral to the decision of a joint grievance committee warrants dismissal of the complaint.

Upon the record, including my observation of the demeanor of the witnesses and after due consideration of the briefs filed by counsel for the General Counsel and for Respondent, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION; THE BUSINESS OF THE EMPLOYER AND THE LABOR ORGANIZATION INVOLVED

Respondent, an Illinois corporation with an office and principal place of business at 6228 North Clark Street, Chicago, Illinois, is engaged in the moving and storage business. During the past calendar or fiscal year, a representative period, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $50,000 for the transportation of goods from the State of Illinois directly to points outside that State. Accordingly, I find that the Respondent is now, and has been at all material times herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Truck Drivers, Oil Drivers, Filling Station & Platform Workers, Local No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union), is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

[1] The stated grounds for the dismissal was the Charging Party's failure to cooperate with the General Counsel's preparation of the case.

[2] After advising Respondent of its intent to amend by letter of October 16, 1981, the General Counsel's motion to amend the complaint by adding allegations of threats purportedly occurring in June and July 1981 was granted.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Joyce Brothers, an agent of Allied Van Lines, is a member of a multiemployer organization, the Movers Association of Greater Chicago, which, *inter alia*, engages in collective-bargaining negotiations with the Union on behalf of its constituents. Respondent, whose president Dennis Mudd also served as president of the Association, has had a 15-year relationship with several locals affiliated with the International Brotherhood of Teamsters and has been bound to a series of 3-year collective-bargaining agreements. The current contract with Local 705, which expires on January 14, 1984, and its predecessor, which was effective from January 15, 1978, to January 14, 1981, contained a grievance-arbitration clause which provided at the third step for a hearing before a six-member joint grievance committee composed of an equal number of union and management representatives.[3] Decisions reached by a majority of the committee were to be final and binding.

B. *The Charging Party Joins Joyce Brothers*

In November 1978, Baker was terminated by his then employer Pickens-Kane which, like Respondent was a member of the Movers Association. While awaiting a grievance hearing on his discharge before the joint committee, Baker applied for a position with Respondent and was hired as a packer-helper. Baker testified that he asked Respondent's operations manager, Fahey, to ask Mudd to extend to him a personal offer of permanent employment. Baker further testified that, during a recess in his grievance hearing, Mudd who served as a member of the joint committee did offer him a job at Joyce Brothers. However, he conditioned that offer on extracting from Baker a commitment to avoid any involvement with the Union. Specifically, Baker stated that Mudd warned him not to "get associated with the fucking Union because the Union can only mean trouble for me" and "if he did not live up to it [his promise to refrain from union activity] he would be terminated." According to Baker, upon accepting Mudd's offer the joint committee took no further action on his grievance.

As with most of the critical events in this case, Respondent's version of the events in 1978 is completely at odds with Baker's. Thus, Mudd denied having a private encounter such as Baker described during the grievance hearing (or at any other time), pointing out that committee members avoided any contact with grievants in the event that their rulings were adverse. In fact, Mudd stated he was unaware that Baker was on Respondent's payroll until the president of Pickens-Kane subsequently advised him of that fact. Further, Fahey denied that Baker ever requested that he urge Mudd to make a personal offer of employment.

In contrast to Baker, whose account of the circumstances surrounding his employment at Joyce Brothers seemed improbable, Mudd who impressed me as a credible witness testified in a consistent and logical manner. As president of an association which had a lengthy and ongoing relationship with the Union, it is inconceivable that he would run the risk of making such intemperate comments to Baker, a virtual stranger, whose union proclivities were unknown to him. Moreover, the minutes of the grievance hearing disclose that the joint committee ordered Baker's reinstatement with backpay. Since Baker had his job back at Pickens-Kane, there was no reason for Mudd to offer him employment at Joyce Brothers. Thus, Baker's attempt to attribute antiunion sentiments to Mudd from the date of his hire was unsuccessful. Instead, Mudd's participation in the committee's favorable decision for Baker suggests that, at least in 1978, Mudd harbored no animus toward him.[4]

C. *Baker's Union Activity*

In mid-December 1979, the Association and the Union began negotiations for a new collective-bargaining agreement. On behalf of the Association, Mudd presented a new wage proposal to the Union which was referred to as the incentive or percentage plan. The Union's negotiating team immediately predicted that the proposal was not likely to be well received by the membership. Nevertheless, at management's request, the union representative promised to present the proposal in a neutral manner.

Mudd testified that, although he originally favored the incentive proposal, his support gradually eroded as he realized how unpalatable it was to his employees. Shortly after presenting the proposal at a bargaining session, Mudd called several meetings of the Joyce Brothers employees to explain the measure's complex terms. At each such meeting, several employees openly and candidly expressed their opposition to the proposal. For example, employee Frank Osborne told Mudd he was "not going for it" and that he would not work under those conditions. Warehouse Foreman Chester Gdula bluntly advised Mudd that he could "take the incentive plan and ram it." After these group meetings, other employees vigorously denounced the proposal to management. Warehouse Foreman Martin McDonagh[5] told Fahey and Robert Proctor, Respondent's customer service manager, that he thought the incentive plan "was a bunch of shit." Responding to Mudd's personal request to appraise the incentive plan, long-distance driver Mario Mangarelli told him that the plan would cost him $50 a day and, therefore, Mudd could throw the proposal in the garbage can.

On January 15, Baker attended a union meeting at which the proposal was presented to the membership and he joined with most of the other 200 employees there who overwhelmingly rejected the incentive plan. By his own admission, Baker was attempting to keep a low profile and therefore was not among those employees who spoke out publicly against the proposal either at

[3] The fourth step provides for the appointment of an arbitrator where grievances were not resolved at the third step.

[4] Mudd also participated in a joint committee decision to reinstate Baker to his job at Pickens-Kane on at least one prior occasion.

[5] Despite the title of foreman, Gdula and McDonagh were unit members covered by the Union's labor agreement. The record established that they exercised none of the authority which typically earmarks a supervisor under the Act.

the company or the union meetings. However, after the conclusion of the January 15 meeting, Baker, with approximately nine other Joyce Brothers employees, met separately with the Union's business agent, William Dicks, and expressed opposition to the proposal. At the same time, Baker asked Dicks whether the employees would be compelled to work without a contract, noting that if they did so they would be unprotected against reprisal. Dicks assured Baker and his coworkers that they need not work without a contract.[6]

D. *Events Preceding Baker's Discharge*

1. January 16–17

Witnesses for the General Counsel and Respondent offer widely divergent accounts of a series of events leading to Baker's discharge. Baker testified that at the start of the workday, on January 16, with approximately 10 other drivers present, he requested a day off for personal reasons. Halliday then called him and coworker John Maudlin into the dispatch office where Dicks, Fahey, long-distance dispatcher Bill Jay, and employee McDonagh were present. When Baker repeated that he wanted the day off, Dicks purportedly erupted that he was attempting to prevent drivers from working without a contract. Baker also testified that Dicks singled him out for trying to block the incentive clause and warned him that the Union would refuse to grieve any discipline which might be imposed upon Baker if he refused to work.

Dicks, Fahey, and McDonagh uniformly denied being present at the small group meeting in the dispatcher's office which Baker described. Instead, Dicks testified that, after being called to Joyce Brothers, he met with a group of drivers and again assured them that they need not work and would suffer no reprisals if they chose not to do so. He asked Fahey to confirm this position to the drivers and Fahey corroborated Dicks' testimony that he did so.

As to the conflicting versions of this episode, I conclude that Baker's story does not ring true. Dicks asserted that it was not his practice to identify or isolate an individual's union efforts. Moreover, in these circumstances, he would have no reason to do so since the tide of opposition against the incentive plan was virtually unanimous. Further, I find irrational Baker's assertion that Dicks on one day would assure drivers that they need not work, only to reverse himself with drivers present on the following morning. McDonagh too failed to support Baker's testimony. I find it significant that the General Counsel neither cross-examined McDonagh in this matter nor called Mauldin, the other driver who Baker said was present, to verify Baker's claims about this episode. A separate and subsequent incident related by another Joyce employee, Chester Gdula, casts further doubt on the accuracy of Baker's description of the January 16 meeting. Gdula stated that on one occasion when Baker mentioned he would continue working in the event of a strike, Gdula promised to "bust both of his . . . ears." Baker subsequently reported this threat to Fahey who in turn relayed it to Mudd. Mudd responded with an oral warning to Gdula admonishing him that such threats were inappropriate. I infer from this episode that Baker's position on not working without a contract was not strongly asserted and, certainly, not earnestly maintained.

On the evening of January 16 Baker became embroiled in another situation about which there is a web of conflicting testimony. Baker asserted that, on Halliday's instruction, he called Fahey at home at 10:30 in the evening. Fahey angrily denounced Baker as "a fucking asshole for . . . trying to block the percentage clause" and threatened that he would lose his job for that conduct and for bringing other employees to the January 15 union meeting in his car.[7] When Baker called Fahey a second time several minutes later to pursue the matter, Fahey purportedly renewed his antiunion diatribe.

According to Fahey, Baker's version of their phone calls was a complete fabrication. Respondent called McDonagh as a witness to explain that he had encountered Baker in a bar that evening in a drunken condition. McDonagh testified that Baker had accused him of making certain unfavorable comments about him to management and had threatened him with bodily harm.[8] McDonagh recounted that he had called Fahey at approximately 9:30 p.m. somewhat fearful that Baker would carry out his threats. Fahey testified that at 1 a.m. he was awakened by a call from Baker who ranted that McDonagh was trying to undermine Baker's job. Fahey suggested that Baker's timing was inappropriate and hung up, whereupon Baker phoned again and resumed his tirade. Several days later, Fahey issued a written reprimand to Baker for his unseemly phone calls.

Again, the more plausible account of this episode was offered by Respondent's witnesses. I found McDonagh to be a credible witness with no motive to slant his testimony. Moreover, although Baker denied having threatened McDonagh, he did not contradict his testimony as to other aspects of their barroom confrontation. Therefore, concluding that Baker was inebriated, I find it far more likely that he, not Fahey, engaged in an intemperate outburst on the telephone about matters that had nothing to do with his position on the incentive clause.

2. February 11

Baker testified that at the end of the workday on February 11 Halliday warned him he would be fired in 2 weeks for trying to block the incentive proposal. In a sworn statement to a Board agent investigating this case, Baker attested that no one else overheard this remark. However, Danny Fox, a fellow driver and friend of Baker's, claimed subsequently that he was standing just outside Halliday's view and did overhear the threat. Halliday did not testify.

[6] The candor which characterized the employees' comments to Mudd about the incentive proposal buttresses the conclusion that Mudd was not inclined to stifle union activity among his employees and thus would not have conditioned Baker's employment on his promise to refrain from similar conduct.

[7] It is interesting that Baker failed to include among Fahey's threats any allusion to Baker's not working without a contract.

[8] McDonagh and Baker's encounter apparently had nothing to do with Baker's opposition to the incentive clause.

I draw no conclusions about whether Halliday threatened to discharge Baker. However, I have grave doubts that, even if he did so, the threat bore any relationship to Baker's opposition to the wage proposal.[9] Baker was less vocal than any number of other employees who expressed vigorous opposition to the measure. Moreover, since by February 11 management had withdrawn the incentive proposal from the bargaining table, it could hardly matter who had opposed the proposition. Further, attendance cards introduced into evidence reveal that neither Fox nor Baker worked on February 11. Although on rebuttal Baker claimed he visited the facility to check on his future schedules, Fox offered no such explanation for his adventitious presence in the drivers' room on a day that he was not assigned to work.

3. February 24: Allegations of stealing time

In addition to its moving and storage operations, Respondent was under contract to Cook County to deliver voting machines by van and absentee ballots in company or privately owned vehicles during election periods. During the November 1980 election, Fahey testified that Baker took an inordinately long time to complete his election deliveries and pickups and thereby aroused suspicions that he was stealing company time.[10] He also testified that, because of a shortage of managerial personnel and out of a desire not to create any friction among the employees while negotiations were underway, he waited until the new contract was executed before attempting to verify whether or not Baker was, in fact, stealing time. On February 24, with the new contract in place, Fahey decided that the moment was opportune to have Baker followed. For most of the morning on February 24 Proctor and Halliday tailed Baker. At the outset, Baker drove a fellow employee from the plant to his home. He was accompanied by Fox who was not assigned to work that day. After following Baker and Fox for several hours that morning, Proctor and Halliday returned to the facility and reported to Fahey that, after Baker made his scheduled stops, he drove the wrong way on a one-way street, parked, entered a restaurant at 9:45 a.m., ate breakfast, and remained there for the next 45 minutes. Then, according to Proctor, Baker drove along an expressway exceeding the speed limit, exited, and took a somewhat circuitous route back to the barn, through an area known as New Town. On one occasion, Baker parked; Fox then exited from the vehicle and walked around briefly.[11] Clark and Broadway both lead to the Company's facility, but Clark is a wider street and a more direct route.

Not surprisingly, Baker and Fox offered a different description of their morning's activities. Baker claimed that, at the start of the day, he advised Fahey that he was having difficulties with his car and asked to use a company vehicle; however, Fahey denied his request. Baker conceded that he dropped one employee near his home and that Fox accompanied him on his deliveries, but maintained that it was customary to have passengers accompany drivers on election days without obtaining management's prior approval. Baker further explained that he parked his vehicle at a gas station while he telephoned to the dispatcher as he was required to do after completing his morning deliveries. Since the station was closed, he entered a nearby restaurant at approximately 10:10 or 10:15 a.m. to make his call. After twice obtaining busy signals, he finally reached the dispatcher and was told to report back to the facility. Both he and Fox claimed that they remained in the restaurant no more than 20 minutes and denied that they ate breakfast there. Given the condition of his vehicle, Baker explained that he decided to return to the bar via Broadway rather than Clark because it had less traffic and had fewer lights. Baker and Fox both denied engaging in a detour and frolic through New Town.

After a lunch break, Baker used his car for deliveries for the balance of the day without incident. However, the following day he brought his car to a repair shop. At the hearing, he produced a bill from the garage showing that the brakes on his vehicle had been repaired on February 25.

4. February 26: The discharge

Baker submitted his timecard on February 25 for the preceding day. In reviewing this card the subsequent day, Fahey observed that Baker failed to report taking any break. He then summoned Baker to his office, questioned him, and, after hearing Baker's denials, discharged him. On the same day Respondent issued Baker a letter which recited the route that he had taken on February 24 and attributed the discharge to his transporting unauthorized passengers, as well as taking and failing to record an excessive break.

Fahey conceded that employees were rarely disciplined for stealing time if the amount of time involved was less than half an hour and, when confronted with the error or omission in his timecard, the employee admitted his wrongdoing. Under those circumstances, Fahey explained that the employee's timecard would be revised by a supervisor to reflect the accurate breaktimes involved. A number of timecards for employees Kallas, McDonagh, and Baker were admitted into evidence showing that reported times had indeed been reduced, generally by no more than 15 minutes. Thus, the Company responded to inadvertent and short breaks by docking the employees' time and, on some occasions, by verbal reprimands. On the other hand, intentional failures to record substantial breaks, that is, those of more than one-half hour, were punished with disciplinary action, ranging from warning letters to discharge. For example, em-

[9] The General Counsel submits that Respondent's failure to call Halliday as a witness warrants an adverse inference that his testimony would not support Respondent's case. I decline to draw such an inference. Judging by the General Counsel's order severing the instant case from the complaint, which was based on a charge filed by Halliday subsequent to his discharge by Respondent, it appears that he was equally available or unavailable, as the case may be, to either party. Accordingly, no adverse inference is warranted. 3A Wigmore, *Evidence*, §§ 1017–18 (3d ed. 1970). See *Consolidated Freightways Corporation of Delaware*, 257 NLRB 1281, 1290, fn. 19 (1981).

[10] In the moving industry a driver's failure to report break periods, for which he would not otherwise be paid, is commonly referred to as stealing time.

[11] New Town, as Fahey explained, is an area frequented by so-called street people and bordered by bars.

ployees Vodicka, Darcy, and Dahle were terminated in 1978, after having been followed, for deliberately failing to report several hours of breaktime. The record indicates that Vodicka was guilty of only one such violation. In December 1978, employees Honig and Pecore also were terminated for failing to report a 2-1/2-hour break. This, too, was Pecore's and Honig's first reported violation. The third member of this crew, Burchfield, received only a 15-day suspension, because as Fahey explained he was a 12-year employee and acknowledged his wrongdoing. Apart from the surveillance of Vodicka, Darcy, and Dahle, Fahey recalled only one other instance in 1975 when a driver was monitored deliberately. However, Fahey related that he, Mudd, and Proctor routinely followed drivers if they encountered them during the course of the day.

As part of his defense, Baker claimed that the practice of conveying passengers on election days without management's consent was well established and widespread. In fact, he claimed that, on the preceding election day in November 1979, the drivers' room was crowded with the employees' companions. Respondent acknowledged that the failure to seek permission to transport a passenger without prior consent would not, standing alone, normally constitute grounds for discharge. It did not concede, however, that a policy prohibiting passengers without permission was nonexistent. Thus, a series of witnesses, including supervisors and employees, testified uniformly that drivers were required to obtain prior consent before taking passengers when making election day deliveries.

E. *The Grievance Proceeding*

At Baker's request, Dicks met with Fahey on the day following Baker's discharge in an effort to persuade him to reinstate Baker. Dicks' efforts failed and a formal grievance was filed which was not resolved at the second step. Therefore, a hearing was scheduled before the joint grievance committee on March 19, 1981.[12]

In testifying before the committee, Baker explained that he believed that his discharge was due to his involvement with union activity. However, according to Baker, the chairman of the committee refused to consider that assertion because it was undocumented and unprovable. Moreover, Baker contended that, although he was permitted to read aloud a sworn statement provided to him by Fox, the committee would not receive that document into evidence nor would it grant Baker a continuance to obtain Fox's appearance at the hearing. Dicks, however, could not recall either that the committee rejected the Fox affidavit or that Baker requested or was denied a continuance.

Minutes of the joint committee hearing, admitted into the record of this case, reflect that the Fox statement was appended to that summary. Further, although the minutes indicate that Baker's grievance was denied, they reflect none of the factors upon which the committee may have relied in reaching its decision. Rather, the minutes simply state that "After a further discussion, a motion was made . . . that based on the evidence presented and the violation of the company rules, the grievance be denied."

F. *The Alleged Threats to Fox*

Fox testified to a series of threats made to him in the months following Baker's discharge which allegedly were designed to restrain him from supporting the Charging Party's version of the events of February 24.

The first of these warnings occurred on February 27, according to Fox, when Halliday pointedly remarked to him that he was married and that jobs were hard to come by. Then, in explicit terms, Halliday threatened to fire Fox if he testified in Baker's behalf at his grievance hearing. Fox immediately reported this threat to Fahey and asked him to have Halliday apologize. Several days later, Fahey told Fox he best forget about the threat, that Halliday was not willing to apologize.

Fahey presented a somewhat different picture of this incident. After Fox related Halliday's threat to him, Fahey admonished Halliday against making such remarks. Fahey then informed Mudd of the episode. Mudd, too, rebuked Halliday and sent him a memo instructing him that such remarks were inappropriate. Fahey maintained that, subsequently, he assured Fox there would be no retaliation against him for participating in Baker's grievance.

Fox next testified about three conversations with Dennis Mudd. The first of these occurred on March 25 after the joint committee denied Baker's discharge grievance. Fox stated that Mudd thumbed his nose at him and said, apparently in a facetious manner, "It was very nice of one of my senior men to put in a written statement against me to the Union." This was followed by Mudd's threatening to assign Fox to third floor work.[13]

Mudd described his conversation with Fox in this way: As Fox was passing his office, he gestured him inside and asked why he lied to the joint grievance committee. When Fox shrugged his shoulders and said, "That's the way it is," Mudd responded that if he were still dispatching drivers, Fox would be assigned to the more onerous third floor work because of his lies.

On another occasion in May, Fox related that he tried to persuade Mudd to reinstate Baker. Mudd refused to reconsider the discharge but suggested that Fox could bring a halt to the matter by altering his version of the February 24 events and admitting that he knew Baker had taken a break and failed to report it.

Mudd readily acknowledged one conversation which Fox initiated immediately after he was interviewed by Respondent's counsel during her investigation of Baker's charge. According to Mudd, Fox urged him to settle the case and put Baker back to work. Mudd replied that, although he had a lot of money invested in training employees such as Fox and Baker and did not relish discharging anyone, he would not settle since he believed the discipline Baker received was proper. He did ask Fox

[12] Dicks' conduct in pursuing Baker's grievance is altogether inconsistent with Baker's claim that the business agent exposed him to management as the opponent of the incentive proposal and threatened not to process his grievance if he were disciplined for refusing to work.

[13] Third floor work are industry code words referring to strenuous moving assignments up and down flights of stairs.

why he had lied in his statement to the joint grievance committee. At this, Fox admitted he may have stretched the truth by 20 minutes.

Again, sometime in June or July, Fox stated that Mudd asked him if he had considered changing his story, that it would be in his best interest to do so. Fox explained that Mudd's suggestion occurred in conjunction with a separate incident in which he and several other employees were accused of stealing time. Fox conceded that Mudd apologized to the three men when he discovered that the accusation was unfounded.

In responding to Fox's last indictment, Mudd recalled that, in Proctor's presence, he merely assured the drivers that the accusations of stealing time had nothing to do with Baker. Other than that one reference, he denied making any other comment to Fox or suggesting to him that he alter his testimony.

III. DISCUSSION

A. *Deference to Arbitration Is Not Warranted*

At the outset, a question is presented as to whether the decision of the joint committee upholding Baker's discharge precludes a decision on the merits in this forum.

The Board has established a policy of deferring to the decisions of arbitral panels to encourage the voluntary settlement of labor disputes, but only where (1) the proceedings were fair and regular; (2) the parties agreed that the proceedings were final and binding; and (3) the award was not clearly repugnant to the purpose and policies of the Act. *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955). In addition, the Board also requires that evidence bearing on the unfair labor practice must have been presented to and considered by the arbitrator if the Board is to refrain from hearing the matter. *Suburban Motor Freight, Inc.*, 247 NLRB 146 (1980).[14]

The General Counsel insists that the proceedings before the joint committee were far from fair and regular for a number of reasons, not the least of which was the committee's purported refusal to receive into evidence the Fox affidavit or to grant Baker a continuance. Moreover, the General Counsel contends that the minutes of the meeting were not properly authenticated and therefore cannot accurately be relied upon as reflecting what occurred. With equal insistence, Respondent points out that the minutes of the hearing establishes that the Fox affidavit was admitted and that Baker acknowledged on the record that the hearing was fair and impartial.

It is difficult to believe that the joint committee failed to take the Fox statement into account, particularly since Baker was permitted to read it aloud. However, since the evidence is somewhat ambiguous on this matter, I am unprepared to say that Respondent has met its burden of proving that the proceedings met the first *Spielberg* criterion. However, a more fatal infirmity marks this hearing. Baker stated that, when appearing before the committee, he alluded to his union activity. However, apart from his representations, no proof exists that the committee took his testimony into account or gave any consideration to the factors germane to the statutory issue. The minutes clearly do not mention Baker's alleged protected activity. Indeed, they are barren of any analysis of the evidence presented nor do they reflect the reasoning which underlay the committee's decision denying Baker's grievance. Thus, there is simply no basis upon which to determine whether the unfair labor practice aspect of Baker's grievance played a part in the committee's deliberations. Accordingly, without proof that the *Suburban Motor Freight* criterion was satisfied, deferral to arbitration would be inappropriate.

B. *The Discharge Was Lawful*

In cases such as this involving an alleged violation of Section 8(a)(3), the issue posed is whether an employee's concerted activity was the motivating factor in the employer's decision to discipline him. In resolving this issue, the General Counsel bears the burden of proving by a preponderance of the evidence that Baker engaged in union or other concerted activity and that Respondent's knowledge of this activity was a significant factor in its decision to discharge him. See *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). I conclude that the General Counsel has failed to meet his threshold burden, for the evidence fails to establish that, even if Respondent was aware of Baker's union involvement, that knowledge played any part in its decision to terminate him.

There can be no dispute that Baker's opposition to the incentive clause and his inquiries about working without a contract constitute protected concerted conduct. See *Soundesign Corporation*, 232 NLRB 993, 998 (1978). However, given the record in this case, a serious question must be addressed as to whether Respondent knew of Baker's sentiments.

By his own admission, Baker was reluctant to publicly express his views. Nevertheless, the General Counsel contends that management's knowledge is revealed by (a) the January 16 meeting at which Dicks, in management's presence, branded Baker a militant opponent of the incentive clause and the leader of a potential walkout; (b) Fahey's 10:30 p.m. telephone conversation with Baker on January 16; and (c) Halliday's threats of discharge on February 11. As discussed above, I found Baker's accounts of these incidents wholly implausible. Accordingly, they do not provide evidence that management had specific knowledge of Baker's union activity. Nevertheless, management may have had some reason to believe that Baker opposed the incentive clause, if only by virtue of the fact that almost all of the union members similarly were opposed. It is also possible that Baker's participation with some nine other Joyce Brothers employees at a meeting with Dicks on January 15 came to management's attention. A more likely source of knowledge stems from Baker's participation in a group demand that Fahey guarantee against reprisals if they chose not to work without a contract. Although such evidence is

[14] As in *Suburban Motor Freight, supra* at 152, fn. 11, no contention is made here that the committee did not constitute an arbitration body within the meaning of *Spielberg*. But see Member Jenkins' dissenting opinions in *Automobile Transport, Inc.*, 223 NLRB 217 (1976), and *Terminal Transport Company, Inc.*, 185 NLRB 672 (1970), on grounds that arbitral panel lacked neutral members.

circumstantial at best, it is minimally sufficient to give rise to an inference of knowledge.

Assuming, therefore, that management was aware of Baker's attitude, a more fundamental question arises which is never satisfactorily answered: That is, why would management single out Baker for discipline when a number of his coworkers were far more vocal than he in their opposition to the incentive plan. Baker vastly exaggerated his own opposition to the plan and magnified the significance which management attached to his views. The truth of the matter is that in comparison to the positions taken by far more outspoken employees such as Osborne, McDonagh, and Mangarelli, none of whom was disciplined for his conduct, Baker's opposition was negligible. The reason for Baker's exaggeration is not hard to find: Unless he portrayed himself as a firebrand, any motivation for his discharge, which might otherwise be cognizable under the Act, evaporates.

The timing of Baker's discharge, a factor often relied on to prove discrimination in 8(a)(3) cases, works to the General Counsel's disadvantage here and reinforces the conclusion that the discharge was not discriminatorily motivated. By February 11 when Baker accused Halliday of threatening to fire him because of his union involvement, or by February 24 when he was followed, the percentage clause had been withdrawn from the bargaining table and the entire issue had been put to rest with the execution of a new contract. Similarly, Baker's inquiries about working without a contract never were converted into a reality and were irrelevant by the time Baker was discharged. Moreover, on one occasion when Baker was threatened by a coworker for implying he would continue working if a strike occurred, management came to his defense.

Further, the element of union animus is wholly absent from this case. As I found above, it is inconceivable that Mudd made the antiunion remarks which Baker attributed to him in 1978. In terms of recent conduct, credible evidence from several witnesses established that Mudd was exposed to and even solicited far more abrasive comments about the incentive proposal than were ever forthcoming from Baker. Indeed, by mid-January it is clear that Mudd was disenchanted with the proposal and was among those on the management team who urged that it be abandoned without resort to hard bargaining tactics. In these circumstances, the suggestion that Baker was penalized for opposing a clause which the Company's president had abandoned a month before the discharge is insupportable.

The General Counsel contends that Respondent's application of its policy against stealing times was so disparately applied to Baker as to constitute evidence of its unlawful motivation.

Baker did not deny Fahey's assertion that he took an excessive period of time in delivering ballots in November 1979, that he transported two passengers on February 24, nor that he failed to report a break on his timecard on that date. Therefore, the only factual dispute is whether he remained in the restaurant for 45 minutes and then deliberately took an indirect route back to Respondent's facility, or whether he and his companion, Fox, remained in the restaurant no more than 20 minutes and took a relatively straightforward road back to the barn.

Because of my previous findings with respect to Baker's penchant for distorting the truth, I am not inclined to believe his version of the events of February 24. There are independent reasons why I find that Proctor, and not Baker, should be credited. First, I was impressed with the authenticity of the contemporaneous notes which Proctor kept during his surveillance of Baker. If Proctor wished to dissemble it would have been a simple matter to build a case against Baker by stretching the time Baker lingered in the restaurant well beyond 45 minutes, and to invent a far more bizarre route back to the barn. In contrast to Proctor, Fox did not reconstruct the events of February 24 until 3 weeks later. His ability to recall his and Baker's whereabouts and timetable with computer-like precision is too remarkable to be believed. Indeed, Fox partially admitted that he had stretched the truth when he told Fahey that he and Baker might have been in the restaurant 20 minutes longer than he originally reported. I also find no reason to assume that Proctor invented each of Baker's twists and turns through the New Town area. Proctor had no purpose to do so, whereas Baker and Fox had ample motivation for dissembling. Even if Broadway is somewhat less trafficked than Clark, the city street map shows that Clark is a much more direct route back to the barn. Since it was the street most frequently used by Joyce Brothers drivers, I fail to understand why Baker would chose to avoid it. Moreover, even if Baker had troublesome breaks, they were not damaged enough to prevent him from weaving through some of New Town's side streets.

It is true, as the General Counsel points out, that Respondent's past practices with respect to disciplining employees for stealing time were less than uniform. Surveillance was rare and discipline infrequently imposed. However, the record shows that neither surveillance nor discharge for stealing time was altogether unprecedented when the circumstances were egregious. Although this was the first time Respondent documented Baker's stealing more than one-half hour, Fahey's response to this violation was not based solely on an unreported 45 to 60 minutes. Rather, it was apparent that he reacted to Baker's denying any wrongdoing when confronted with what Fahey had good reason to believe was unassailable evidence of his theft of company time. Further, even if the record does arouse some suspicion regarding the reasons for Baker's discharge, suspicion alone is not sufficient to meet the General Counsel's burden of proof that Respondent's motives were unlawful. See *Pork King Company, Inc.*, 252 NLRB 99, 100, fn. 8 (1980); *Carrom Division, Affiliated Hospital Products, Inc.*, 245 NLRB 703, fn. 1 (1979).

It is a well-established principle that where the trier of fact "finds that the stated motive . . . is false, he certainly can infer that there is another motive. More than that he can infer that . . . the motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference." *Shattuck Denn Mining Corporation (Iron King*

*Branch)*v. *N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966). Even if I were to surmise that Respondent's stated reason for following and then firing Baker was not its real reason, it does not follow that its true motive was an unlawful one. It is unnecessary to engage in idle speculation as to what, if any, other motive Respondent may have had, for I am convinced that it bore no relationship to Baker's concerted activity. As long as the decision to sever Baker from its employ was not generated by discriminatory considerations, Respondent was free to fire Baker for good cause, poor cause, or no cause at all.[15] It follows from the above discussion that Respondent did not violate Section 8(a)(3) and (1) of the Act by discharging Baker on February 26, 1981. Accordingly, I shall recommend dismissal of those paragraphs in the complaint alleging that the discharge was unlawful.

C. *Conclusions as to Independent 8(a)(1) Violations*

As evident from the discussion *supra* I did not credit Baker's story that Fahey threatened to discharge him on January 16 or 17 or that Halliday's threat to discharge him was tied to his union involvement. Accordingly, I shall recommend the dismissal of paragraphs V(a) and (b) of the complaint.

Fox's account of his February 27 encounter with Halliday is more troublesome. The issue here is not whether Halliday made the unlawful statements Fox attributed to him, but whether, after being advised of those remarks, Respondent took appropriate steps to retract them. If a copy of Mudd's memo chastising Halliday had been sent to Fox, or if Halliday had apologized as Fox requested, there would be little difficulty in resolving this matter. However, without any unequivocal documentation that Respondent formally communicated its disavowal of Halliday's threat, Fahey's comment that Fox need not fear retaliation may not have appeared sufficiently reassuring. As the Supreme Court observed in *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 617 (1969):

> . . . the precise scope of employer expression . . . must be made in the context of its labor relations setting. . . . And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

It was within Respondent's power to make its retraction clear and convincing. Since it failed to do so, I conclude that Respondent must be held liable for violating Fox's rights guaranteed by Section 7 of the Act.

Resolution of the conflicts between Fox's and Mudd's accounts of their conversations is even more problematic. I am mindful, on the one hand, that Fox's credibility is enhanced by the fact that he offered testimony adverse to Respondent although still in its employ. See, e.g. *Sanitas Cura, Inc., d/b/a Parkview Acres Convalescent Center*, 255 NLRB 1164 (1981); *Motz Poultry Company*, 244 NLRB 573, 575, fn. 7 (1979). On the other hand, Mudd was seasoned in labor-management relations. Especially after Baker filed an unfair labor practice charge, Mudd would have been exceedingly cautious in overstepping the bounds of propriety.

Balancing these considerations, I conclude that Respondent must be faulted for whatever ambiguity arose as a result of Mudd's remarks to Fox after the March grievance hearing. Mudd initiated the conversation and acknowledged raising questions regarding Fox's statement to the joint committee. He also admitted alluding to third floor work and certainly was in a position to implement such discipline if he chose to do so. It was not unreasonable, then, for Fox to read a warning into Mudd's remarks. I conclude, therefore, that however unintended Mudd's comments to Fox in March violated Section 8(a)(1) of the Act.

I decline to draw the same conclusions about any subsequent statements Mudd was alleged to have made. Fox conceded that his recollection of their exchanges was vague. Further, when questioned closely, he revealed that Mudd did not ask him to change his testimony; rather, that Mudd expressed his disbelief in Fox's account of the events of February 24. In these circumstances, Respondent cannot be held accountable for whatever inferences Fox drew. Accordingly, I shall propose the dismissal of paragraph V(e) of the amended complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Truck Drivers, Oil Drivers, Filling Station & Platform Workers, Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening Danny Fox with reprisals in March 1981 to restrain him from presenting evidence at Patrick Baker's grievance proceeding and for providing a written statement which was offered at that proceeding, Respondent violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices have a close, intimate, and substantial effect on interstate commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent did not unlawfully threaten to discharge Patrick Baker nor terminate him for discriminatory reasons on February 26, 1981.

THE REMEDY

Having found that Respondent has engaged in several unfair labor practices, I will recommend that it be ordered to cease and desist therefrom and from any like or related conduct. Affirmatively, Respondent will be required to take certain affirmative actions including posting copies of the notice appended to this Decision.

Upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

[15] See *N.L.R.B.* v. *Ace Comb Company*, 342 F.2d 841 (8th Cir. 1965); *Borin Packing Co., Inc.*, 208 NLRB 280 (1974).

ORDER[16]

The Respondent, Joyce Brothers Storage and Van Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening any employee with reprisals in order to prevent him from offering evidence or because he has offered a written statement for use at a grievance proceeding.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Post at its Chicago, Illinois, facility copies of the attached notice marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by a representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that, insofar as the complaint as amended herein alleges other violations of the Act which have not been found, these allegations are hereby dismissed.

[16] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[17] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties had an opportunity to present evidence and cross-examine witnesses, the National Labor Relations Board found that we have violated the National Labor Relations Act, and has ordered us to post this notice. We intend to abide by the following:

The Act gives all employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

Accordingly, we assure you that:

WE WILL NOT threaten any employee with reprisals in order to prevent him from offering evidence or because he has offered a written statement for use at a grievance proceeding.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

JOYCE BROTHERS STORAGE AND VAN COMPANY